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In The
Supreme Court of the United States
No. 852
October Term, 1959

LEE C. MOORE CORPORATION,
Petitioner,
VERSUS
EMMETT W. PRYOR and PACIFIC EMPLOYERS INSURANCE COMPANY, a Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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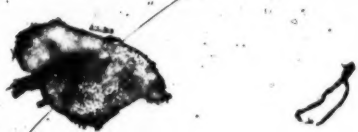
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Lee C. Moore Corporation prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit which became final January 21, 1959. The judgment of the Court



of Appeals reversed a judgment of the District Court of the United States for the Western District of Oklahoma and remanded the cause for a new trial.

The opinion of the Court of Appeals is officially reported at 262 F. 2d 673, and is reproduced at pages 31 to 35 of the Appendix.

The District Court wrote no opinion as such but its oral findings of facts and conclusions of law (not officially reported) are reproduced at pages 27 to 30 of the Appendix.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The Court of Appeals for the Tenth Circuit entered its judgment on December 22, 1958. Petitioner's timely Motion to Reconsider was denied (one Judge dissenting) January 21, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Did not the Court of Appeals err in failing and refusing to follow and apply the law of Oklahoma (*lex loci delicti*) as declared by the highest appellate court of that State, the Supreme Court of Oklahoma, as required by 28 U. S. C. 1652?
2. Did not the Court of Appeals err in holding and deciding that the stipulated and undisputed fact of more than 15 years' safe use of the allegedly defective and unsafe instrumentality (a drilling mast manufactured by petitioner) for its intended purpose in oilfield drilling operations did not justify the District Court in directing a verdict in favor of petitioner, there being no evidence at all of causal connection between the alleged defect in the mast and the accident, collapse of the mast, on the grounds that the jury should not be permitted to speculate that the alleged defect was the cause of the accident.
3. The plaintiff having failed to offer *any* evidence as to proximate causal connection (as alleged in his Complaint) between the alleged defect in the mast manufactured by petitioner and the happening of the accident, and it being undisputed that the mast involved was not at the time of the accident, and had not, for more than 15 years prior thereto (the parties having so stipulated) been in the custody or control of defendant, did not the Court of Appeals err in holding and deciding that (a) the jury might speculate that the alleged defect in the mast was the cause of the accident and (b) that the District Court improperly directed a verdict for defendant, the District Court's instructions to the jury being predicated on the ground that there was no evidence of any causal connection and that such causal connection could not be inferred from proof of the mere existence of the alleged defect and the happening of the accident.

STATUTE INVOLVED

§28 U. S. C. 1652. **State laws as rules of decision**

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, C. 646, 62 Stat. 944.

SUMMARY STATEMENT OF THE CASE

This action, originally instituted in the District Court of Oklahoma County, Oklahoma, was removed to the United States District Court for the Western District of Oklahoma under 28 U. S. C. 1141 (a) and 28 U. S. C. 1332 (a) (1) because of diversity of citizenship of the original parties thereto (Pryor and petitioner) and the amount in controversy exceeded $3,000.00, exclusive of interest and costs.

Respondent Pryor was working on the mast of an oil drilling rig in Oklahoma in 1955 when the mast was "pulled in" causing his injuries. A drilling mast of the kind here involved is commonly, although erroneously, called a "derrick" in the parlance of the oil fields of the Southwest, since both masts and derricks perform the same function in rotary drilling operations and a mast in operation, when seen from a distance, somewhat resembles a derrick. At the time the mast was pulled in Pryor, a member of the drilling crew operating the rig, was standing on a platform, which was part of the mast, 60 feet or more above the ground. The drilling crew was attempting to pull the drill pipe upward out of the well. The drill pipe was stuck or held in the hole, probably because of the existence of some underground obstruction. In the course of this attempt to pull the pipe in an upward direction the mast was pulled in, that is, it collapsed, falling toward the northeast. Pryor rode the mast down

and was injured when he hit the ground. Pryor was paid Workmen's Compensation by his employer's insurer, respondent Pacific Employers Insurance Company (Pacific). Pacific brought an action in the name of respondent Pryor against petitioner, the manufacturer of the mast, alleging that the mast involved was defectively manufactured in 1940 and that its collapse in 1955, resulting in injuries to the respondent Pryor was caused by *a specific manufacturing defect—installation of an improper weld intended to join and hold together in the course of drilling operations the bottom end of the southeast leg and the foot of such leg.*

It was stipulated and the evidence showed that the original mast, if manufactured by petitioner, was sold in 1940 to National Supply Company for the account of Glassell & Glassell of Jennings, Louisiana, where it was used for drilling operations for several years; that in 1944 the rig was purchased and used by Stanolind Oil Company in the Houston, Texas area for a period of approximately 9 years thereafter or until 1953; that it was then purchased by the Thompson-Raines Drilling Company of Healdton, Oklahoma, which moved it about and used it to drill oil wells until June of 1955; at which time it was purchased by respondent Pryor's employer Edwards & Moore Drilling Company and it had been thereafter and was being used by Pryor's employer in drilling operations at the time of the accident in August, 1955.

Although the record showed by exhibits and testimony that, at the time of the accident, the metal had been worn, corroded and eroded in use and by the action of the elements, there was no evidence in the record that the mast was defectively manufactured in 1940 in the sense that it was then unsafe or unduly hazardous when used for the purpose for which it was thereafter safely used or that it was not properly designed and, in any case, the parties stipulated that the mast performed the function for which it was intended for more than 15 years before the happening of the accident. Respondents' evidence consisted solely of testimony of witnesses that when they examined that part of the southeast leg of the mast which had been cut off for the purpose of their examination and the southeast foot which had been torn away from the leg, the two having been joined in the course of manufacture by means of a weld, they concluded that the weld was of poor quality. However, they freely admitted that they had no knowledge of the strength of the weld in place nor of the weld strength necessary to hold the leg and foot together in the course of drilling operations and, hence, could not and did not express any expert opinion as to the adequacy or inadequacy of the weld. Respondents offered no testimony, nor any exhibits, tending to show that the portion of the mast complained of (the welded juncture between the southeast leg and its foot) was pulled apart prior to the falling of the mast. After

the mast had fallen, it was found that the southeast leg and the southeast foot which had been joined together by the weld, had been pulled apart across the area of the weld and that some of the parent metal had also been torn away. It is obvious that the forces operating to pull these pieces of steel (the mast leg and its foot) apart were forces acting in tension. There was proof of Pryor's injuries and payment of medical expenses and compensation for those injuries to Pryor by Pacific.

Respondents (plaintiffs below) rested at the conclusion of their direct case. Petitioner (defendant below) thereupon demurred and moved for a directed verdict. The District Court sustained the demurrer and directed a verdict in favor of petitioner on the grounds that (1) there was no evidence that the petitioner's alleged negligence (the installation of a defective weld joining the southeast mast leg to its foot in the course of manufacture of the mast) proximately caused the accident and respondent Pryor's injuries and (2) in the absence of any evidence showing direct causal connection between petitioner's allegedly defective weld and the collapse of the mast after 15 years' use in oil drilling operations, respondents' allegations, that the mast was imminently hazardous and dangerous to life and limb at the time of its manufacture and sale, were conclusively disproved by respondents' stipulated admission of such long period of use.

The Court of Appeals, in reversing the District Court, evidently misunderstood the grounds relied upon by the District Court as the basis for its directed verdict and said in its written opinion (App. 32), misstating the reasons given by the District Court in its instructions directing a verdict for petitioner, that the verdict had been directed "on the ground that 15 years of safe use for the purpose for which the equipment was intended foreclosed any probability that it was defectively or negligently made." The Court of Appeals obviously overlooked or ignored the fact that the District Court relied on the prolonged use of the mast as conclusively disproving the allegation that the instrumentality was "eminently (sic) dangerous to life and limb when manufactured and sold" (App. 28) and did not rely to any extent on the concept that such prolonged usage disproved or contradicted the allegedly negligent manufacture. The Court of Appeals also apparently misconceived the District Court's reliance on the complete absence of proof of any kind as to the proximate cause of the accident (the basic reason for the District Court's direction of a verdict in favor of petitioner) and applied a rule—that of *res ipsa loquitur*—followed only in cases where the burden of proof of showing the absence of negligence on its part is shifted to a defendant after proof of the happening of the accident, because the defendant is the only party in a position to produce evidence that its conduct was not the negligent and proximate cause

of the accident, for the reason that it had exclusive custody and control of the instrumentality at the time of the accident. The *res ipsa loquitur* doctrine is not applied in cases where plaintiff pleads or relies on a specific act of negligence or where the instrumentality involved is not in the exclusive custody and control of the defendant at the time of the accident, as in this case.

ARGUMENT

This writ of certiorari should be granted for the reason that the reversal by the Court of Appeals for the Tenth Circuit of the judgment in favor of petitioner entered upon a verdict directed by the District Court decides an important State question in a way which is in conflict with the applicable law of the State of Oklahoma and procedurally departs widely from the statutory rule of decision (28 U. S. C. 1652) for the adjudication by Federal courts of the rights existing or created under the statutory or common law of any State: *Erie Railroad Company* v. *Harry J. Tompkins*, 304 U. S. 64, U. S. Supreme (1938), 82 L. 3d. 1188.

In order that this Court may understand the conditions under which respondent Pryor sought recovery by the institution originally of an action in Oklahoma state court petitioner feels obliged to describe here more fully than it has done in its foregoing Summary Statement

of the Case, the mechanism and operation of the drilling mast manufactured by petitioner which was in the accident in which Pryor was injured.

At trial in the District Court there was present in full view of the District Court a physical model, referred to on page 29 of and elsewhere in the Certified Record as defendant's Exhibit 1. The Court of Appeals did not have it before it, at the time of the argument of the appeal in that court, such physical model nor any photograph, drawing, or other pictorial representation of a mast of the type involved in this case showing *the position in which it stands while in operation*. The exhibits reproduced in the Certified Record, consisting of pictures of the mast comprising respondents' Exhibits 5, 6, 7, 8, 9, and 10, are photographs of the drilling rig taken after the happening of the accident in which respondent Pryor was injured and do not in any case show what a mast looks like or how it is operated.

From his visual observation Judge Rizley, as he conducted the trial of this action in the District Court, could easily see and understand the manner of operation of the mast when being used to perform its function of pulling drill pipe upwardly out of the hole for the purpose of putting on a new bit, as was being done at the time of the accident. He could and did see that the drilling mast, when performing this particular part of the drilling op-

eration, performs the same function as the structure (usually wooden) housing the crankshaft of an old-fashioned water well, the water being raised from its level at the bottom of the well to the surface of the ground in a bucket to which is attached a rope which is attached at the other end of the crankshaft of the well. In operation the rope is wound up on or around the crankshaft thus pulling the bucket upwardly when a person desiring a drink of water rotates the handle of the crankshaft in order to bring the water within reach. Judge Rizley could see, did see, and based his direction of a verdict in petitioner's favor upon the easily reached conclusion that when the mast here involved was being operated to pull the drill pipe out of the hole a downward force of great, but not particularly relevant extent, was being exerted upon each, including the southeast leg of the mast and the foot attached to the southeast leg by the allegedly defective weld. He comprehended, it being undisputed that the steel leg and the steel foot attached thereto by means of the weld had been pulled apart rather than crushed together, that the separation of these two pieces of steel was caused by forces acting in tension (i. e., forces pulling the leg and foot apart) rather than the crushing or compression force being exerted upon these structural steel members in the course of and as the result of the pulling of the drill pipe out of the hole. From this *he drew the only possible conclusion*, that (a) the condition

or nature of the allegedly defective weld could not and did not in any way proximately cause the happening of the accident and (b) the collapse of the mast must and could only have resulted from some other cause, as to which there was no allegation of negligence in the pleadings or proof that such other cause was due to petitioner's negligence.

Since the Court of Appeals did not have before it a physical model of a mast of the type here involved and had before it no photographs, drawings, or other pictorial representation of the mast in the position in which it was being operated at the time of the accident, the Court of Appeals was substituting its own finding of a fact, as to the existence of which it had no evidence nor apparently any basic understanding, for a finding of fact made by Judge Rizley based upon what he could and did actually see before him in the courtroom at the trial of the case.

This departure from established and usual judicial procedure has never been sanctioned by this Court. It is very much like the situation where the presiding judge at a trial sees that an object is painted red and so finds; the appellate court, without ever having seen the painted objected, finds as a fact that such object is painted green, thereby substituting its judgment, as to which it has no evidentiary basis in the record before it, for the judgment of the trier of facts.

This is exactly what happened in the case at bar. Judge Rizley understood how the mast was being operated at the time of the accident and found as a matter of fact that the failure of the allegedly defective weld was not and could not have been the proximate cause of the collapse of the derrick, because he could see from the photographs taken after the happening of the accident (plaintiff's Exhibits 5 to 10 reproduced at page 97 of the Certified Record) and respondents' witnesses had testified that the southeast leg and foot of the mast had not been crushed together but had been pulled apart. The Court of Appeals, with no physical evidence before its eyes from which it could reach any logical conclusion that the allegedly defective weld was the proximate cause of the mast's collapse held, in reversing Judge Rizley's direction of the verdict in favor of petitioner, that a jury could properly infer that the compressive forces tending to crush the steel leg and its steel foot together could and did pull them apart—an obvious physical impossibility.

In *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817 (1938), this Court overruled the long standing doctrine of *Swift* v. *Tyson*, 16 Pet. 1, 10 L. Ed. 865 (1842), construing Section 34 of the Federal Judiciary Act of 1789 (28 U. S. C. 725, now Section 1652 of the Judicial Code, Revision of 1948; 28 U. S. C. 1652) and held that the decisional law of the respective States constituted the

"rules of decision in civil actions in the courts of the United States, in cases where they apply"; *Swift* v. *Tyson*, *supra*, having held otherwise. In consequence the decisional law of the State of Oklahoma upon the subject matter involved in this case constitutes the "rules of decision" which the United States District Court for the Western District of Oklahoma followed but which the United States Court of Appeals for the Tenth Circuit, in reversing the judgment of such District Court, failed and refused to apply.

The decisional law of the State of Oklahoma in respect of the specific subjects involved in this case may be briefly summarized as follows:

(1) The plaintiff in an action brought and pending in a State court of Oklahoma, the right of recovery therein being predicated upon the failure of the manufacturer of an instrumentality which, unless properly designed, manufactured, and inspected before sale to and use by the purchaser, may be imminently hazardous or dangerous to life and limb of persons exposed thereto, has the burden of establishing at trial that there was negligence in the design, manufacture or inspection of the instrumentality before its sale, that such negligence proximately caused injury to the plaintiff and that such injury was an expectable consequence of the exposure of plaintiff in the use and operation of the instrumentality.

Eastern Torpedo of Ohio v. *Shelts*, 121 Okl. 103, 247 P. 974.

(2) That in cases where plaintiff's proofs permit the possibility of an inference that a specific and identifiable act of negligence of the manufacturer in designing, manufacturing or inspecting the instrumentality before its sale was more probably the proximate cause of plaintiff's injury under the circumstances of the case. The question as to whether the injury was proximately caused by such defect in the instrumentality as opposed to the possibility that the injury was not proximately caused thereby, is a question of fact which the trial court is required to submit to the jury as the trier of the facts of the case:

Mealey-Wolfe Drilling Co. v. *Lambert*, 208 Okl. 624, 256 P. 2d 818.

(3) That in cases where plaintiff's proofs permitting the drawing of only one inference, namely, that the injury was not and could not have been proximately caused by the alleged defect, no disputed question of fact is presented which requires a finding thereon by a jury and the trial court is entitled to and should direct a verdict in favor of defendant, as was done in this case:

Atchison, T. & S. F. Ry. Co. v. *Phillips*, 158 Okl. 141, 12 P. 2d 908.

(4) When the plaintiff's own proof shows that the plaintiff's injury could not have been and was not caused by defendant's alleged negligence and, the trial court,

in consequence, directs a verdict in favor of the defendant, the appellate court, unless the trial court clearly misunderstood the purport of the evidence, may not substitute its judgment for that of the trial court as to the fact found by the trial court on the basis of such uncontroverted proof:

Bradshaw v. *Superior Oil Co.* (Okl.), 164 F. 2d 165.

The decisional law of the State of Oklahoma applicable to this case is not as the Court of Appeals held in the following paragraphs (1), (2) and (3):

(1) That the proximate cause of respondent Pryor's injury could be established in this case by more than one permissible inference from the established facts, and was thus a question of fact for the jury (App. 35).

(*The Oklahoma rule applicable in this case is that where the only inference as to proximate cause which, in this case, as the trial court found, can possibly be drawn from the evidence was that the alleged defect was not and could not have been the proximate cause of Pryor's injury, no jury question is presented*).

(2) That prolonged safe use of machinery is merely evidence to be considered by a jury in determing whether its alleged negligent manufacture was the proximate cause of the injury. (App. 34).

(*The Oklahoma rule applicable in this case is that such prolonged safe use is a conclusive denial and contradiction of the allegation that the instrumentality was im-*

minently dangerous to life and limb when the defendant sold it and has nothing to do with the question of proximate cause).

(3) That an appellate court may substitute its judgment as to a fact found by the trial court based on physical evidence presented at trial and considered by the trial court as the evidence sustaining the trial court's finding of such fact when the appellate court on review has not seen such physical evidence (App. 35).

[*The Oklahoma rule applicable in this case is that an appellate court may substitute its judgment as to a fact found by the trial court only when it (the appellate court) has before it on appeal the evidence considered by the trial court and such evidence conclusively indicates that the trial court's finding based on such evidence was clearly unfounded.*)

The precise issue involved in this case was very simple. It was: Was there any evidence to support a finding by the jury, if the motion for a directed verdict had been refused, that the petitioner's alleged negligence in the installation of the weld in the course of its manufacture of the mast involved proximately caused Pryor's injury? The answer to this is equally simple. There was not a scintilla of evidence from which it could be concluded that Pryor's injury resulted from the alleged manufacturing defect. Conversely, the plaintiffs' own evidence showed conclusively that Pryor's injury was not caused by the alleged manufacturing defect. At the time of the

accident the southeast leg and foot were being stressed in compression or, in layman's language, the steel leg and the steel foot were being forced together. The plaintiffs' evidence, including plaintiffs' photographic exhibits taken shortly after the happening of the accident, showed that the leg and foot had been pulled apart rather than being crushed together by the crushing force being exerted upon them in the operation of the mast as described by the plaintiff and other witnesses in their testimony. Obviously, what happened was that the crushing forces which were acting upon the northeast leg caused it to fall or commence to bend in a northeast direction away from its normally vertical operating position and as the northeast leg bent away from the vertical, the compressive stresses operating upon the southeast leg changed direction and became forces acting in tension, i. e., pulling the southeast leg and foot apart. The physical forces acting upon the structure being clearly apparent to the trial court from his visual observation of the physical model and respondent's photographic exhibits, the trial court concluded that the parting of the allegedly defective weld joining the southeast leg and its foot was not the cause of the falling of the mast but was, in fact, a result of the bowing or bending of the northeast leg and thus could not in any sense be regarded as causing the falling of the mast. Respondents neither alleged nor offered any evidence to show that petitioner was negligent in any respect in de-

signing, manufacturing or inspecting *the northeast leg of the mast* before the mast was sold. Plaintiffs' evidence was limited to proof of the happening of the accident, that the weld joining the southeast leg and its foot was, indulging all inferences in favor of respondents, a "lousy" weld, and as to the nature and extent of Pryor's injuries and damages. There was no proof or any evidence tending to show that the accident happened because the welding of the southeast leg to its foot in an allegedly improper manner caused the accident. The incontrovertible physical facts as disclosed by the physical exhibits showed that the allegedly defective weld did not contribute to the causing of Pryor's injuries. In these circumstances, the trial court was obviously justified in so finding as a fact and in directing a verdict in favor of petitioner.

The Court of Appeals in its opinion seeks to make much of its alleged refusal to follow the doctrine of *Lynch* v. *International Harvester Co.* (C. C. A. 10, 1932), 60 F. 2d 223, in which it was held that undisputed proof of prolonged safe use of a machine constituted a conclusive denial and contradiction of the allegation that the machine was imminently dangerous to life and limb when sold by the manufacturer. The *Lynch* case, *supra*, did not involve to any extent whatever the matter of causal connection between the alleged negligent manufacture and the happening of the accident. The facts in that case were that after some 5 years of safe use of a threshing machine

manufactured by defendant International Harvester, plaintiff stepped upon an iron lid covering a revolving cylinder which had projecting teeth or spikes, that such lid or cover sagged or gave way causing Lynch's leg to be caught and mangled by the revolving cylinder. Lynch alleged negligent manufacture, in that the iron lid was not properly designed or constructed to afford adequate protection to persons stepping thereon as the machine was being operated and as it was expected they would do, and that he was injured thereby. Obviously, if the iron lid had been defective the proof to the manner of the happening of the accident would have showed that the failure of the lid was the proximate cause of Lynch's injuries. The court held, however, that the 5 years of safe use precluded any inference of negligent manufacture and approved the sustaining of a demurrer to the complaint.

The Court of Appeals in the case at bar said that, although there was no proof of proximate cause, such proximate cause could be inferred even though 15 years of safe use of the instrumentality indicated that the instrumentality had not been dangerous or hazardous to life or limb at the time of its manufacture and sale.

The effect of this holding, which is completely foreign to the problem involved in the *Lynch* case, *supra*, is vicious in its implications. If permitted to stand, it means that a manufacturer is an insurer of his products allegedly

manufactured in a defective manner even though there is no proof that injury to a plaintiff is proximately caused by the alleged defect; in other words, that a plaintiff may recover merely by alleging and proving a manufacturing defect, the happening of an accident, and injury to a plaintiff, without showing that the alleged manufacturing defect, even if proved, was the proximate cause of the happening of the accident. Economically this is a startling proposition. Manufacturers of virtually all mechanical equipment—automotive equipment, airplanes, agricultural machinery, road-building equipment, railway equipment, communications equipment, transportation equipment, etc., may be faced with lawsuits throughout the nation with no obligation upon the plaintiff to produce evidence tending to show that an alleged or proven defect in the design or manufacturing of such equipment caused plaintiff's injuries.

The problem of proof of proximate cause involved in the case at bar is identical in all essential respects with the decision of the Supreme Court of Oklahoma in *Bison Transport, Inc.* v. *Fraley*, 205 Okl. 520, 238 P. 2d 835. In that case the negligence alleged was that of decedent's employer in failing to provide safe and adequate brakes on the truck which he was driving at the time of the accident and his death. There was no proof that the brakes were defective at the time of the accident or that the al-

legedly defective brakes caused the accident. There was evidence that shortly prior to the accident the brakes had been operating satisfactorily. The Supreme Court of Oklahoma reversed the action of the trial court in permitting the matter to go to a jury, and remanded the case with instructions that judgment be entered in favor of the defendant. The Oklahoma Supreme Court pointed out that a jury may not conjecture or speculate as to the existence of the alleged negligence or that the alleged negligence was the proximate cause of the accident. In the case at bar while the evidence of any negligence, the allegedly defective weld, was controverted by undisputed evidence of safe usage of the instrumentality for a prolonged period 15 years, there was no evidence at all that the alleged negligence was the proximate cause of the accident and plaintiff's injury. This was the rule applied by the trial court which the Court of Appeals in reversing the trial court's directed verdict failed and refused to follow. See, also, *Jamison* v. *Reda Pump Co.*, 190 Okl. 593, 126 P. 2d 71. In that case the defendant's demurrer to the evidence was held to be properly sustained on the ground that, as the Supreme Court of Oklahoma noted, there was no proof of negligent manufacture. While the Court of Appeals may not have been required to follow the doctrine of the *Lynch* case, *supra*, as to the effect of proof of prolonged safe use as a complete contradiction of the existence of alleged negligent manufacture, proof of prolonged safe use is not an element necessary to be con-

sidered in determining whether alleged negligent manufacture proximately caused an injury. There must be independent proof of such proximate cause. And if such proof be lacking, or if the undisputed proof conclusively indicates that the injury was not caused by the alleged defective manufacture, a jury cannot be permitted to speculate or conjecture on the question of proximate cause. To state the proposition more concisely, no question of fact requiring exercise of a jury's function exists when the evidence of record does not connect alleged negligence with the injury, or conclusively demonstrates that the injury was not caused by the alleged negligence. In the case at bar there was conclusive proof that the alleged negligence did not proximately cause the injury.

The nature of the evidence in the *Bison* case, *supra*, was markedly similar to the nature of the evidence in the case at bar:

1 (a) In the *Bison* case it was shown that the allegedly defective brake system had been operating properly immediately prior to the accident, the truck involved having been driven many miles through city traffic and across country in the course of which the brakes were of necessity operated several times. There was no evidence that the brakes had not worked up to the time of the accident.

(b) In the case at bar, the mast had been operated safely for a period of more than 15 years up to the time it was pulled in.

2 (a) In the *Bison* case there was no proof that a brake failure was the cause of the accident so that at best the proximate cause of the accident was a matter of pure speculation and conjecture.

(b) In the case at bar there was not only no proof that the allegedly defective weld caused the accident, but the physical evidence showed undisputedly that the alleged defective weld was not and could not have been the cause of the accident and that the accident must, therefore, have been caused by some other factor.

The Oklahoma rule is expressed by the Supreme Court of Oklahoma in the *Bison* case and, hence, is the rule of decision which the Federal courts are required by Statute (28 U. S. C. 1652) to follow. The *Bison* case was based upon proofs less favorable to the defendant than in the case at bar; the failure and refusal of the Court of Appeals to follow the *Bison* rule constitutes the most blatant and gross sort of error. In the case at bar there was not merely no proof of proximate cause (the evidential situation which existed in the *Bison* case), but there was direct physical and incontrovertible proof that the accident was not and could not have been caused in the manner alleged by respondents.

CONCLUSION

For the reasons above stated, petitioner respectfully submits that this application for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

"U. S. District Court's Findings of Fact and Conclusions of Law (Pages 92-94 Transcript of Record):

By Rizley, District Judge.

THE COURT: "Ladies and gentlemen of the jury, in this case there isn't any question but what the plaintiff has proved that he was working in an oil derrick owned by the Edwards and Moore Company and there is no question but what he proved that while he was working on the derrick, the rig collapsed and, as a result of that, the derrick fell with him and he was seriously and painfully and permanently injured.

"Of course, it is not in every case that simply because someone has been injured he can recover from a defendant. There are many exceptions to that rule and, before a plaintiff in a damage suit can recover for any injuries sustained as a result of an accident, the burden is upon him to establish that the negligence of the defendant was the cause of that accident. In other words, it must have been as a result of the negligence of the defendant that proximately caused the injury to the plaintiff. Now the plaintiff has brought a number of expert witnesses, engineers and metallurgists and welders that have testified a part of the rig, especially a foot which was welded to the mast of the rig, was welded improperly. That evidence is not disputed. These witnesses testified that a weld should last at least the life of the parent metal which is welded together. None of these witnesses has testified as to what the life of parent metal or weld should be in number of years.

"This Court, based upon a decision of the Tenth Circuit Court of Appeals, will take judicial notice, and it is common knowledge, that all machinery constantly depreciates in strength and usefulness over a period of time. A manufacturer, when he manufactures a machine of any kind, is not a warrantor that it will last forever. Common sense dictates, and I am certain under the rules of law in this circuit, we must take into consideration that machinery is going to depreciate in usefulness and in strength over a period of time. It was stipulated in this case in the pleadings that the defendant manufactured this rig in 1940, about fifteen years prior to the time of its collapse. It was also stipulated that the rig was sold to various purchasers, transported and used over a wide territory in three states prior to the time the plaintiff in this case was injured. I don't think there is any evidence in this case that the foot, shown in evidence to have been definitely welded to the mast, was the cause of the rig collapsing, and it is my opinion that, in the absence of any evidence showing a direct, causal connection between the defendant manufacturer and the collapse of the rig, after fifteen years use of the machine, its transportation from state to state, and repair over that period of time, based upon decisions of our own court in this circuit, are a contradiction of the allegation that the machine was eminently dangerous to life and limb when the defendant manufactured and sold it. Our court has held that very thing, in my opinion, in *Lynch* v. *International Harvester Company*, 60 F. 2d 223.

"There is no question but what this young man was seriously injured but this Court, taking the plaintiff's side in its most favorable light, and drawing therefrom all inferences which could reasonably be drawn which are favorable to plaintiff, is of the opinion the plaintiff does not make a *prima facie* case of negligence, and that that negligence was the proxi-

mate cause of this injury, and I think it is my duty as a judge to sustain this motion for a directed verdict. I very seldom sustain motions for directed verdicts but the Court has a duty to perform in these cases. I think it is obvious, especially in a case of this kind, that there is a duty and responsibility of the Court to direct and tell the jury in view of the serious damages here that, in the Court's opinion, the evidence is insufficient to make a *prima facie* case for damages against the manufacturer in this case due to the things the Court has suggested, during the long period of time between the manufacture of this rig and its long use.

"The motion, therefore, will be sustained and the case will be dismissed."

"OPINION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 5871—November Term—1958

Appeal From The United States District Court

For The

Western District of Oklahoma

Emmett W. Pryor and Pacific

Employers Insurance Company,

Appellants,

versus

Lee C. Moore Corporation,

Appellee.

(December 22, 1958)

Clyde J. Watts (Claud Briggs and the firm of Looney, Watts, Looney and Nichols were with him on the brief) for Appellants.

Alex Cheek (Vilard Martin, Jr. was with him on the brief) For Appelle.

Before BRATTON, Chief Judge, and MURRAH, PICKETT, LEWIS and BREITENSTEIN, Circuit Judges.

MURRAH, Circuit Judge

"The appellant, Pryor, was injured in the course of his employment on an oil well drilling rig, when the mast, sometimes called a derrick, collapsed under the tensile strain of a pipe-loosening and pulling operation. Having received workmen's compensation under the laws of Oklahoma, Pryor and his employer's compensation insurance carrier sued the appellee-

manufacturer of the derrick as in *MacPherson* v. *Buick Motor Co.*, 111 N. E. 1050[1], claiming that a defective weld at the foot of one leg of the derrick caused it to collapse under the tensile strain. There was expert evidence to the effect that properly fused, the weld would be expected to have the same useful life as the parent metal, and that its failure indicated a defective weld at the point of failure.

"The trial court, however, directed a verdict and entered judgment for the defendant-manufacturer, on the grounds that fifteen years of safe use for the purposes for which the equipment was intended foreclosed any probability that it was defectively or negligently made. The court followed *Lynch* v. *International Harvester Co. of America*, 60 F. 2d 223, in which this court, while recognizing the *MacPherson* rule, held that five years of constant use of a threshing machine for its intended purposes was a 'conclusive denial and contradiction of the allegation that the machine was imminently dangerous to life and limb when the defendant sold it.'

"The appellant would distinguish that case from ours for latent defects here and readily discoverable ones in the *Lynch* case. But the question whether mere lapse of time forecloses probability of negligent manufacture was squarely presented and decided in the *Lynch* case. The same question is presented here, and we must therefore now decide whether we will follow or recede from the *Lynch* doctrine. The *Lynch* case also arose in Oklahoma, but no Oklahoma case was cited in support of the rule. And, while Okla-

[1] Oklahoma embraces the doctrine of this case to the effect that 'The manufacturer of an appliance that will become highly dangerous, because of defects in its manufacture, when put to the use for which it is designed and intended, owes to one purchasing and using such appliance, the duty to use reasonable care in its manufacture; and failure to discharge such duty may constitute negligence.' *Gosnell* v. *Zink*, 325 P. 2d 965. And see also *Consolidated Gas & Equipment Co. of America* v. *Carver*, 257 F. 2d 111

homa has embraced the full vigor of *MacPherson* (i. e. see footnote 1), it has neither approved Lynch nor had occasion to consider the precise question. It has said only that if a device is suitable and safe for the purpose for which it is to be used when sold, the manufacturer has then discharged his duty to those who thereafter use it. *Jamison* v. *Reda Pump Co.*, 126 P. 2d 71. But this statement clearly presupposes nonnegligent manufacture, and is thus not helpful to a consideration whether any probability of negligent manufacture is legally foreclosed by prolonged safe use.

"Only recently, the Fifth Circuit, following its conception of Texas law, deliberately refused to adopt a policy of foreclosing liability after prolonged use without defective failure. It did not think the lapse of seven years *per se* relieved a derrick manufacturer from liability for injuries caused by a defective weld. *International Derrick & Equipment Co.* v. *Croix*, 241 F. 2d 216. Nor does the Second Circuit believe that mere passage of time confers immunity upon a negligent wrongdoer under the *MacPherson* doctrine. *Fredericks* v. *American Export Lines*, 227 F. 2d 450. The District of Columbia Court of Appeals has reached the conclusion that 'the law itself does not say that the passage of nearly seven years, or the action of the elements * * * constituted an efficient intervening cause * * * so that any causal connection between Gichner's negligence and the giving away was necessarily broken.' *Hanna* v. *Fletcher*, 231 F. 2d 469, 475, 58 A. L. R. 2d 847. All of the cases agree, however, that proximity of time and events is cogently relevant in the determination of the ultimate factual issue whether the negligent manufacture caused the harm. *Hewitt* v. *General Tire & Rubber Co.*, 284 P. 2d 471; *Reed & Barton Corp.* v. *Maas*, 73 F. 2d 359; *Lil* v. *Murphy Door Bed Co. of Chicago*, 8 N. E. 2d 714. Our problem is not one of duty owing to the

injured party under the *MacPherson* concept, rather it is one of causation which traditionally lies in the realm of fact, not law. Cf. *Sitta* v. *American Steel & Wire Div. of U. S. Steel Corp.*, 245 F. 2d 12. The policy decision is therefore whether the defense of use without injury shall be a matter of law to be declared as such, or whether it shall be left to the trier of the facts, with the province to consider all of the relevant factors relating to legal cause. In a jury trial, the issue is for the court only when minds of reasonable men would not differ.

"The proposition that prolonged safe use bars any interference of negligent manufacture has not gained wide acceptance in the application of the *MacPherson* doctrine. As far as we have been able to ascertain, the *Lynch* case has been followed and applied in only a few isolated cases involving this proposition. *Solomon* v. *White Motor Co.*, 153 Fed. Supp. 917; *Schindley* v. *Allen-Sherman-Hoff Co.*, 157 F. 2d 102; *Sterchi Bros. Stores* v. *Castleberry*, 182 So. 471; *Willey* v. *Fyrogas Co.*, 251 S. W. 2d 635. Certainly no firmly established body of tort laws has grown up around it. A reappraisal of the problem in the light of subsequent decisions persuades us to recede from the rule in *Lynch*, and to hold that prolonged used of a manufactured article is but one factor, albeit an important one, in the determination of the factual issue whether the negligent manufacture proximately caused the harm.

"Apparently quite apart from the time element as an intervening cause, the trial court did not think the plaintiff proved the issuable fact that the defective weld caused the derrick to collapse as it did. There was no direct evidence of proximate cause, and indeed there need not be, for proximate cause is often left to permissible inferences from established facts. *Mealy-Wolfe Drilling Co.* v. *Lambert*, 256 P. 2d 818; *Mid-Continent Coaches, Inc.* v. *Guthrie*, 257 P. 2d

829; *City of Altus* v. *Martin*, 268 P. 2d 228; *Fleming* v. *Hodgson*, 185 P. 2d 181. There was direct evidence to the effect that the southeast leg of the derrick was broken off where it was welded to its foot. The proof shows that in an ordinary drilling operation, such as ours, it is not unusual for the drill pipe to stick in the hole while being routinely pulled to the surface. Here the pipe had become temporarily fastened, but not immovably so, and the strain in this particular operation was not unusual or extraordinary. It was an incident which usually occurs during the drilling of any oil well. And, it was in these circumstances that the southeast leg of the derrick broke at the point of the weld. The derrick collapsed toward the northeast, causing the northeast leg of the derrick to buckle and bend outward. From these physical facts we think it was permissibly inferable that the failure of the weld caused the derrick to collapse under the ordinary pressure being applied in the routine operation. The question of proximate cause was therefore one of fact under all the related circumstances.

"The case is accordingly reversed and remanded for a new trial."

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MAY 26 1959
JAMES R. BROWNING, Clerk

No. 852

In The Supreme Court of the United States

October Term, 1959

LEE C. MOORE CORPORATION,
Petitioner,

VERSUS

EMMETT W. PRYOR and PACIFIC EMPLOYERS INSURANCE COMPANY, a Corporation,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION OF PETITIONER, LEE C. MOORE CORPORATION, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CLAUD BRIGGS,
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MAY, 1959.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION OF PETITIONER, LEE C. MOORE CORPORATION, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PRELIMINARY STATEMENT

Petitioner, Lee C. Moore Corporation, asserts jurisdiction of this Honorable Court for writ of certiorari to review a judgment of the United States Court of Appeals

for the Tenth Circuit reversing a judgment of the United States District Court for the Western District of Oklahoma, and remanding the cause for a new trial, on the grounds that the court of appeals, in reversing said judgment, decided an important State question in conflict with applicable State law, within the scope of Rule 19 (b) of this Court.

Respondents, Emmett W. Pryor and Pacific Employers Insurance Company, oppose the petition for writ of certiorari to review the opinion (officially reported at 262 F. 2d 673) and judgment of the United States Court of Appeals for the Tenth Circuit, entered December 22, 1958, for the following reasons:

(1) That decision is not in conflict with applicable Oklahoma law.

(2) The case of *Bison Transport, Inc.* v. *Fraley*, 205 Okl. 520, 238 P. 2d 835, asserted by petitioner for the first time in this Court, to be controlling, is merely factually distinguishable from this case, as are the other cases cited by petitioner in its Petition for Writ of Certiorari.

STATEMENT OF FACTS AND ISSUES

Respondent, Emmett W. Pryor, and his employer's insurance carrier, Pacific Employers Insurance Company (respondent), instituted this action for damages for personal injuries sustained by Pryor in the collapse of the mast of an oil well drilling rig, while being utilized in pipe

pulling operations, against petitioner, Lee C. Moore Corporation, as the manufacturer of said mast. Recovery was sought against petitioner on the ground that the proximate cause of the collapse of the mast was the negligence of petitioner, as manufacturer, in improperly welding the mast to its base in the manufacturing process.

The allegations of improper welding in the manufacturing process were supported by undisputed expert evidence of engineers, metallurgists and welders presented by respondents, as observed by the trial court in his findings of fact and conclusions of law. These expert witnesses testified that the weld, if properly fused, would be expected to have the same useful life as the parent metal. Expert evidence showed that failure of the mast was at the point of the defective weld (R. 47, 48, 52, 60, 61, 93).

However, the trial court, in the face of the undisputed evidence of the defective weld, nevertheless directed a verdict and entered judgment for defendant manufacturer (petitioner), specifically following the Tenth Circuit case of *Lynch* v. *International Harvester Co. of America*, 60 F. 2d 223, concluding as a matter of law that the stipulated fifteen years of safe use of the equipment, by various purchasers, over a wide territory, foreclosed the probability of negligent manufacture, as the proximate cause of the collapse of the mast (R. 93).

In reversing the decision of the trial court, and remanding the case for a new trial, the United States Court

of Appeals for the Tenth Circuit noted strict reliance of the trial court upon the *Lynch* case, and the identity of the sole question involved in that case with this one, namely whether prolonged use of the manufactured article without injury absolutely foreclosed negligent manufacture as proximate cause of the injuries, as a matter of law, or whether causation should be left to the trier of facts. The Tenth Circuit Court then specifically receded from its decision in the *Lynch* case, concluding from a reappraisal of the doctrine of *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, cited approvingly in the *Lynch* case, together with decisions subsequent to the *Lynch* case, that prolonged safe use of manufactured equipment within its intended purposes, is merely one of the relevant factors pertaining to causation, to be considered by the triers of fact, rather than one of law for the court; that the question becomes one of law only when minds of reasonable men would not differ on the probabilities of cause of the harm.

The Circuit Court then concluded the evidentiary physical facts of the defective weld and failure at the point of the weld, while the rig was being used in customary pipe pulling operations, appearing in the record, constituted such circumstantial evidence, admissible under the laws of the State of Oklahoma, creating a permissible inference that the mast collapsed because of the defective weld, which must be resolved by a jury trial.

REASONS FOR DENYING THE WRIT

PROPOSITION ONE

No unique or conflicting decision involving Oklahoma law was involved in the decision of the Circuit Court to reverse the judgment of the trial court, the sole question here being one of causation, which the Circuit Court determined under meticulous delineation of stated Oklahoma law, or generally applied laws, in absence of an expression of Oklahoma law.

Petitioner contends that certiorari should be granted it on the grounds that the Circuit Court, in reversing the judgment in its favor entered upon a directed verdict, ignored dispositive Oklahoma law by which to judge proximate cause, as established by *Bison Transport, Inc.* v. *Fraley*, 205 Okl. 520, 238 P. 2d 835; and further ignored established judicial procedure on appeal by substituting its judgment for that of the trial court upon physical evidence viewed by the trial court, showing how the collapse must have happened, but not in evidence in physical form before the Circuit Court.

But the *Bison Transport, Inc.* case, *supra*, is clearly distinguishable from the factual situation existing in this cause. In that case, which did not concern asserted negligence of a manufacturer in manufacture and sale of its product, but rather alleged negligence of defendant transport company in furnishing a truck with inadequate brakes on a tractor trailer which deceased employee was required

to drive, the case was reversed with directions to direct a verdict for defendant, upon the stated grounds that there was absolutely no evidence in the record showing primary negligence in asserted furnishing of faulty brakes. The court noted the evidence permitted no other conclusion except that the brakes were in good condition up to the time of the accident, foreclosing the question of faulty brakes as proximate cause of the death of plaintiff's decedent, as a matter of law.

In this case, however, the evidence was undisputed that at the time of manufacture and sale of the mast involved, there was a defective weld between the foot and the leg of the mast. So it must be concluded that primary negligence has been successfully interposed as a factor in the determination of proximate cause. Thus the *Bison Transport, Inc.* case, *supra*, becomes factually inapplicable at once for the disposition of this case. It is interesting to note that the *Bison Transport, Inc.* case, *supra*, was never suggested as controlling prior to petition for writ of certiorari, for obvious reasons.

Petitioner, in reasserting the fact of fifteen years of safe use of the mast as an efficient intervening cause foreclosing negligence in the manufacturing process as the proximate cause of the collapse (page 22 of its brief), and in asserting that there must be "independent proof" of proximate cause (page 23 of its brief), and in stating that the *Lynch* case did not involve the matter of "causal connection between

the alleged negligent manufacture and the happening of the accident" (page 19 of its brief), obviously attempts to rejuvenate the validity of the holding of the Tenth Circuit Court in the *Lynch* case, *supra*, which the Tenth Circuit Court in this case overruled, within the clear province of that court to overrule its decisions, and to re-examine its own doctrines. See *Helvering* v. *Hallock*, 309 U. S. 106, 84 L. Ed. 604, 60 S. Ct. 444, 125 A. L. R. 1368. This is particularly true when the courts of the particular jurisdiction involved have not passed upon the question involved, as in this case. See *Princess Garment Co.* v. *Fireman's Fund Ins. Co. of San Francisco, Cal.* (C. C. A., Ohio), 115 F. 2d 380.

It is obvious from close analysis of the opinion of the Tenth Circuit Court in this case, that said court carefully and meticulously reconsidered the *Lynch* case, in relation to this case, and concluded that in both there was an identity of the ultimate question involved, namely whether prolonged use without injury of a manufactured article constituted a legal issue or factual issue relative to causation, under the doctrine of *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050. The Circuit Court of Appeals noted that the Oklahoma court has not had occasion to consider the *Lynch* case, nor was an Oklahoma case cited in support of that decision. In determining to overrule the decision of the *Lynch* case, the Circuit Court in this case, permissibly looked to the law of other jurisdic-

tions to determine that the cases consistently hold that prolonged use of a manufactured article is but one of the important factors to be considered in factually determining the question of proximate cause, rather than a question of law for the court. See *International Derrick & Equipment Co.* v. *Croix*, 241 F. 2d 216; *Fredericks* v. *American Export Lines*, 227 F. 2d 450; *Hanna* v. *Fletcher*, 231 F. 2d 469, 58 A. L. R. 2d 847. See also *Reed & Barton Corp.* v. *Maas*, 73 F. 2d 359; *Lil* v. *Murphy Door Bed Co. of Chicago*, 8 N. E. 2d 714.

Furthermore, in concluding that proximate cause may be proven by circumstantial evidence, or from permissible inferences from established facts as opposed to the decision of the trial court that direct causal connection must be proven between the asserted negligent manufacturing process and the collapse of the mast, the Circuit Court was following well-established Oklahoma law. See *Mealy-Wolfe Drilling Co.* v. *Lambert*, 256 P. 2d 818; *Mid-Continent Coaches, Inc.* v. *Guthrie*, 257 P. 2d 829; *City of Altus* v. *Martin*, 268 P. 2d 228; *Fleming* v. *Hodgson*, 185 P. 2d 181.

In contending that the Circuit Court, in drawing inferences from the record evidence, without having before it the physical evidence of the replica of the oil drilling rig with the mast, substituted its own findings of fact for those of the District Court beyond its judicial province, petitioner seeks to deny the clear-cut mandate of the

Circuit Court to construe the record evidence, on appeal from a directed verdict in favor of defendant, and to draw every permissible inference therefrom in a light most favorable to plaintiffs (respondents). See *Lanier* v. *Great Atlantic & Pac. Tea Corp.* (C. A. Ark.), 205 F. 2d 292; *U. S.* v. *Blair* (C. C. A. Colo.), 198 F. 2d 557. This does not deny the validity of the cases cited by petitioner to the effect that when only one inference may be drawn from the record evidence to the effect that plaintiff's injuries could not have been caused by defendant's negligence, the question is no longer one of fact for the jury, as in the Oklahoma cases of *Bison Transport, Inc.* v. *Fraley*, 205 Okl. 520, 238 P. 2d 835; *Atchison, T. & S. F. Ry. Co.* v. *Phillips*, 158 Okl. 141, 12 P. 2d 908; *Bradshaw* v. *Superior Oil Co.* (Okl.), 164 F. 2d 165, cited by petitioner.

In this case the Circuit Court has obviously evaluated the record evidence to determine that sufficient physical facts were proven to permit a reasonable inference that the proximate cause of collapse of the mast was the negligence of the petitioner (manufacturer) in defectively welding the mast in the manufacturing process. Under the principles stated by this Honorable Court in *Rice* v. *Sioux City Memorial Park Cemetery*, 75 S. Ct. 614, 349 U. S. 70; *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 43 S. Ct. 422, 261 U. S. 387; 67 L. Ed. 712; *In re: Woods et al.*, 12 S. Ct. 417, 143 U. S. 202, this Court will not exercise its discretionary judicial prerogative in certiorari, when

the Circuit Court has interposed its judgment upon an appreciation of circumstances which admit of different interpretation, which are not of public importance, as distinguished from that of the parties, and no embarrassing conflict of opinion and authority exists between the various Circuit Courts of Appeal, or between the Circuit Court of Appeal and the State court.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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MAY, 1959.